MOTION FILED
JAN 23 1984

No. 83-1039

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

KINNETT DAIRIES, INC.,

Petitioner,

v.

DAIRYMEN, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit.

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE NATIONAL INDEPENDENT DAIRY-FOODS ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether the conduct and acts of a Capper-Volstead cooperative, once formed and operating, are to be judged under the Sherman Act as would those of a business corporation, union or other independent entity recognized by law as a person?

2a. Whether joint agreements and conduct between legally distinct cooperatives is relevant and should be given great evidentiary weight in consideration of Section 2 Sherman Act counts?

b. Whether a higher and undefined standard of proof of "predatory" conduct is required in Section 2 Sherman Act cases challenging conduct of Capper-Volstead cooperatives possessing a dominant or overwhelming share of the markets?

3. Whether the conflict between a majority of Circuits squarely rejecting a "predatory" standard in Sherman Act Section 2 cases involving Capper-Volstead cooperatives (Sixth/Eighth/Ninth) and a minority of Circuits adopting it (Second/Eleventh) creates such chaos in administering the law, cooperatives and markets for basic foodstuffs as to compel this Court to grant the Petition and settle the issue?

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The National Independent Dairy-Foods Association (NIDA), through counsel, respectfully moves this Court, pursuant to Rule 36 of the Supreme Court Rules, for leave to file as an *amicus curiae* its attached brief in support of the petition for writ of certiorari, consent by respondent having been refused. In support movant states as follows:

1. NIDA is a non-profit, non-stock corporation organized and chartered under Delaware law as a trade association to advance the interests and general welfare of all persons engaged in the processing, manufacturing, production, distribution and sale of dairy products; to encourage ethical principles, fair dealing and honorable practices and other general business standards beneficial to the dairy industry; and to work for and encourage the elimination of unfair trade practices.

2. NIDA, by virtue of its national perspective and membership, is able to offer information and views not available to

the Court from the parties, and submits that its views are important to the interests of all independent, non-exempt handlers and processors of agricultural commodities.

3. In addition, independent dairy farmers compete with large cooperatives to supply independent processors. Their viewpoints may not be adequately presented. NIDA raises particular issues of concern to independent farmer producers that otherwise may not be brought to the attention of this Court.

WHEREFORE, the National Independent Dairy-Foods Association respectfully prays this Court for leave to file its brief submitted herewith as an *amicus curiae* in support of the petition for certiorari.

January 23, 1984

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE NATIONAL INDEPENDENT DAIRY-FOODS ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the Eleventh Circuit dated September 19, 1983, for which review is sought herein is reported at 715 F.2d 520 (11th Cir. 1983).

The opinion of the District Court for the Middle District of Georgia, in which the case was tried, is dated March 10, 1981 and is reported at 512 F. Supp. 608 (M.D. Ga. 1981).

STATUTES INVOLVED

Section 2 of the Sherman Act (15 U.S.C. § 2), and Section 1 of the Capper-Volstead Act (7 U.S.C. § 291) are set forth in the Petitioner's brief in Appendix F (pp. 102-103), and are incorporated as if reprinted herein.

INTEREST OF AMICUS CURIAE

NIDA's members are independent proprietary (non-cooperative) dairies which package fluid milk, manufacture ice cream, cheese and other products and market them from facilities in thirty-six states. NIDA is the largest association of independent proprietary dairies. Approximately one-third of these members operate in the relevant market area in this proceeding. Members purchase raw milk from individual dairy farmers or Capper-Volstead marketing cooperatives. Certain NIDA members compete at retail and wholesale with processing and manufacturing divisions or subsidiaries of their supplier cooperatives.

Petitioner is an independent proprietary dairy processor. NIDA members, are as vitally concerned as Petitioner about the issues presented in the Petition. Many members are dependent on Capper-Volstead cooperatives for fifty percent (50%) or more of their fluid milk supplies. Their economic viability

depends upon an uninterrupted supply of fluid milk at reasonable prices. After packaging milk and manufacturing their products, many compete directly with their supplier for the same accounts. All independent proprietary dairy processors will be adversely affected by legal errors in the decisions below which have the effect of expanding antitrust immunity for Capper-Volstead cooperatives in a manner unintended by Congress by raising the standard for proving antitrust violations by cooperatives beyond that universally applied to other industries.

NIDA's views also represent concerns of the independent dairy farmers. Independent farmer producers are often targets of larger cooperatives who seek membership by eliminating alternative markets for independent producers. NIDA members have traditionally provided outlets for independent production. Injury to competition in production markets is directly connected to competition in the wholesale and retail markets for milk products. Elimination of independent producers or their coercion into cooperative membership will further accelerate the regional and national concentration of control in cooperatives over the production and sale of dairy products, while further excluding both processors and farmers as competitors.

STATEMENT OF THE CASE

Plaintiff, a milk processor, sued defendant, a Capper-Volstead dairy cooperative, and demonstrated that:

(a) by agreements, defendant and other independent Georgia cooperatives organized the Georgia Super Pool, which collectively controlled ninety percent (90%) of the milk in Georgia by requiring sale of surplus milk through Dairymen, Inc. (D.I.) as its sole agent and by "repooling," fixed prices, allocated customers, and engaged in a group boycott of customers outside the cartel;

(b) by agreements, defendant and a midwest federation of independent cooperatives, Great Lakes-Southern Milk, Inc.,

fixed prices, allocated customers, divided territories and controlled the supply of milk from one geographic region to another; and

(c) by agreements, defendant and a group of independent midwestern cooperatives known as the "Standby Pool," organized for the purpose of jointly buying up and allocating among member cooperatives excess and unregulated upper midwest supplies of Grade A milk, fixed the price for such milk and boycotted non-member buyers of such milk.

Although plaintiff did not appeal the trial court's erroneous ruling that this conduct did not violate Sherman Act Section 1, analysis of this joint conduct is essential to an understanding of the errors made by both courts below in defining the scope of the Capper-Volstead exemption and the burden of proof in Section 2 Sherman Act cases against cooperatives.

Plaintiff further demonstrated that:

(a) defendant possessed 48-60% of the raw milk market in Kentucky, Tennessee, Georgia, Mississippi, and Louisiana; that defendant's share of the raw milk market in Georgia was 60-75%; and that as a result of the agreements enumerated above, defendant had monopoly power in the Georgia market; that defendant obtained its monopoly by mergers, and the agreements outlined above, and has further obtained and exercised its monopoly by (1) divisions of customers and markets, (2) arbitrary price fixing and the unilateral abrogation of contracts obligating defendant to deliver milk at contract prices, (3) coercive refusals to deal with buyers purchasing milk from competing suppliers, (4) coercively obtaining illegal exclusive dealing contracts, (5) exclusion of competing suppliers from the market, and, (6) cartel agreements with other and independent cooperatives in other markets to prevent entry of milk supplies from those markets into the Georgia and Southeast milk markets;

(b) defendant's conduct, as enumerated, was done with the specific intent and dangerous probability of monopolizing the

supply of milk for distribution in the Georgia market and the retail sale of milk in that market; and,

(c) defendant's cartel agreements, as enumerated, constitute an unlawful conspiracy to monopolize the supply of milk in Georgia and the Southeastern United States.

SUMMARY OF ARGUMENT

The Eleventh Circuit erred in affirming trial court rulings that expand the narrow, implied Capper-Volstead immunity, holding inter-cooperative supply restricting agreements totally immune from the Sherman Act, and applying a vague and undefined "predatory" standard to the Section 2 monopolization counts.

The Circuit Court erred in failing to reject the trial court's *arguendo* ruling allegedly made on non-Capper-Volstead grounds. That District Court ruling finding no antitrust liability in defendant's conduct even when allegedly ignoring the immunity coverage, was confused, illogical and merely a restatement of its own previous erroneous conclusion that Capper-Volstead immunity covered all of defendant's activities unless "predatory." The effect of these errors is to expand the Act's immunity. Congress only intended to protect the cooperative business form alone, not competition-excluding activities. The lower court's holdings also conflict with this Court's clear policy of narrowly construing implied exemptions, particularly for industries not otherwise regulated, from the antitrust laws.

The Eleventh Circuit Court additionally committed error in failing to reverse the trial court's ruling that Capper-Volstead immunity gives cooperatives unqualified rights under inter-cooperative federations and cartel arrangements between otherwise independent corporate cooperatives without regard to the anticompetitive effects of such arrangements or their conduct. The trial court erred by holding that the conspiracy provisions of the Sherman Act do not apply to cooperatives; the Circuit Court did so by implication when it ignored plaintiff's Section 2 conspiracy to monopolize claims.

The Eleventh Circuit Court also erred in ignoring the legal standard for Sherman Act Section 2 cases, announced by this Court in *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966) and *Maryland & Virginia Milk Producers Association* v. *United States*, 362 U.S. 458 (1960) (*Maryland and Virginia*). That standard requires evaluation of the whole of defendant's conduct on the grounds of whether it was exclusionary, and not whether it was "predatory," as required by the trial court and erroneously affirmed by the Circuit. Under this higher "predatory" standard, the trial court ignored the effects of defendant's far-ranging inter-cooperative cartel agreements. It also ignored the status of defendant as a market controlling competitor and supplier of plaintiff. It further ignored defendant's control of fluid milk supply for the purpose of enhancing price and profits beyond reasonable market levels for anticompetitive use against processor competitors. This Court has required a higher than normal duty on the part of a monopolist supplier to deal fairly with its customer competitor. *Otter Tail Power Company* v. *United States*, 410 U.S. 366, reh. denied, 411 U.S. 910 (1973); *United States* v. *Terminal Railroad Association*, 224 U.S. 383 (1912). The trial court's rulings on defendant's other anticompetitive activities, unilaterally taken against plaintiff, such as supply cutoffs, breaking of contracts and pressure on independent farmers not to deal with Kinnett were also erroneously accepted by the Circuit Court. Such harsh treatment of a customer by a supplier raises questions about the motives and intent of such supplier, and requires a higher duty of scrutiny by the courts. The trial court viewed these acts separately, and found them business justified and nonpredatory. The Eleventh Circuit Court erred in failing to require the trial court to consider the combined anticompetitive effect of all of these hostile acts, individually justifiable or not, when viewed as a whole and in combination with defendant's cartel agreements, under *Maryland and Virginia* and *Grinnell*, *supra*. These legal errors expand the Capper-Volstead exemption to protect unlawful market power achieved through anticompetitive conduct of such cooperatives over and against not only processors, but also independent

farmers. The Circuit Court's decision creates a split among the Circuits at three levels: (a) over the scope of the exemption, (b) whether the conspiracy provisions of the Sherman Act apply to cooperatives at all, and (c) the correct standard to be applied in such Section 2 cases. This confusion injures competition, and creates chaos in administering the antitrust laws, cooperatives and markets for all agricultural products handled by cooperatives.

REASONS FOR GRANTING THE WRIT

I.

SCOPE OF THE CAPPER-VOLSTEAD EXEMPTION.

This case involves the scope of the Capper-Volstead exemption for agricultural cooperatives, and was not decided on other independent grounds, notwithstanding the trial court's ruling to the contrary.

The District Court, after an extensive but compartmentalized view of the evidence, ruled that defendant's activities were within the scope of Section 1 Capper-Volstead Act immunity and Section 6 of the Clayton Act. The court reasoned that defendant retained its Capper-Volstead immunity for all but "predatory" conduct, which the court claimed was not proved by evidence. The court then assumed *arguendo* that even if defendant did not have Capper-Volstead immunity, plaintiff's evidence failed to establish antitrust liability on the part of defendant, under traditional Sherman Act standards. 512 F. Supp. at 640-43. This indicates the confused view of the court. Without the exemption, formation of the co-op and its price-fixing would have been a *per se* violation of the Sherman Act Section 1.

The Eleventh Circuit Court perfunctorily affirmed. Over the dissent of Judge Morgan, two members of the Circuit Court selected the three remand issues in *United States* v. *Dairymen, Inc.*, 660 F.2d 192, at 195 (6th Cir. 1982), which were Kinnett's grounds for appeal, seemingly applied them to the trial court's conclusions, and affirmed *per curiam*. 715 F.2d

at 521. This cursory treatment of the trial court's opinion is insufficient to overcome what is clear on the face of the District Court's opinion: that the trial judge's "independent" finding resulted from its confusion about the scope of the Capper-Volstead immunity.

The trial court's confusion of the "predatory" and "competition-stifling" standards is obvious. Under the immunity analysis, the court had already concluded that defendant's conduct was both "not competition-stifling or predatory." 512 F. Supp. at 638. The independent grounds should be looked at as nothing more than a restatement of its conclusion under the "predatory" standard applied in the first analysis. This "predatory" standard resulted from the trial court's adoption of the erroneous rulings by a minority of other courts that cooperatives should somehow be afforded greater protection for their anticompetitive conduct than business corporations. The Circuit Court erred in not finding that the trial court never separated the two analyses as claimed.

It is apparent that both courts below failed to keep analytically distinct the question of the scope of the exemption afforded farmers forming agricultural cooperatives under Section 6 of the Clayton Act and the Capper-Volstead Act and the question of whether defendant cooperative's non-exempt conduct violated the Sherman Act. Both issues were merged into an ill-defined and confusing analytical process by the trial court granting total immunity for all but "predatory" conduct under the offenses defined by Section 2 of the Sherman Act. The result is a sharply broadened exemption. The Circuit Court failed to clarify this reasoning. Neither opinion defines the concept "predatory" in a way which makes it understandable or manageable in the administration of the exemption for cooperatives or the antitrust laws.

Thus, contrary to the language of the affirming decision, there were no independent grounds other than the application of the Capper-Volstead immunity to support the rulings.

There is no regulatory statute expressly governing the anticompetitive activities of agricultural cooperatives. Therefore, the scope of the antitrust exemption for agricultural cooperatives must be divined from the legislative history of the Capper-Volstead Act, which reveals that the purpose of the immunity was to be narrow and limited. Implied exemptions from the antitrust laws even under a regulatory statute are disfavored and to be narrowly construed. *Otter Tail Power Company* v. *United States*, *supra*.[1] The basic purposes of the agricultural exemption and the Capper-Volstead Act are limited to allowing farmers to form cooperatives, raise capital, issue stock and form agencies in common to market their products.[2]

It is clear that the proponents of the bill which became the Act were asking only for access to the advantages of the corporate *form* available to businessmen.[3] It is also clear that in their request, the proponents of the bill were not further asking that farmers be granted a special privilege under the antitrust laws.[4] They were asking only for the limited right to a

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[1] Implied exemptions from the antitrust laws are found only where there is an irreconcilable conflict between antitrust policy and the regulatory act involved, or an affirmative showing of legislative intent to repeal by implication. Bolter and Day, *Implied Trust Repeals: Principles for Analysis*, 86 Dickinson L. Rev. 447, 465-66 (1982).

[2] 7 U.S.C. § 291, *Maryland and Virginia*, *supra*.

[3] "The object of this bill is to authorize the producers of agricultural products to *form* associations for the purpose of collectively preparing for market and marketing their products." H.R. Rep. No. 24, 67th Cong., 1st Sess. 1-3 (1921) (Emphasis added).

[4] "Business corporations have under existing law all the powers and privileges sought to be conferred on farm organizations by this bill. *Instead of granting a class privilege, it aims to equalize existing privileges* by changing the law applicable to the ordinary business corporations so that farmers can take advantage of it." H.R. Rep. No. 24, 67th Cong., 1st Sess. 1-3 (1921). (Emphasis added).

business form to put them on an equal competitive footing with business corporations.[5]

The House Report contains an unqualified assurance that the purpose was not to create special freedoms or privileges for cooperatives, nor allow them greater freedom under the antitrust laws than allowed non-exempt corporations.[6] Congressman Volstead added his personal assurance to that effect during Floor debate.[7]

In the closely related and contemporaneous exemption enacted for labor unions under Section 6 of the Clayton Act, this Court held that the exemption was limited to formation of a union and did not immunize activity violating the antitrust laws by the union once formed. *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 433 (1921); *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters Association*, 274 U.S. 37 (1927). Even though there has been additional legislation substantial-

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[5] Senator Capper stated in debate over the language of the Act: "Mr. President, the Cooperative Marketing Bill as it was offered in both the Senate and the House seeks simply to make definite the law relating to cooperative organizations of farmers and *to establish a basis on which these organizations may be legally formed*. Its purpose is to give the farmer the same right to bargain collectively that is enjoyed by corporations." 62nd Cong. Rec. 2057 (Feb. 2nd, 1922). (Emphasis added).

[6] "In the event that associations authorized by this Bill shall do anything forbidden by the Sherman Antitrust Act, they will be subject to the penalties imposed by that law. It is not sought to place these associations above the law, but to grant them the same immunity from prosecution that corporations now enjoy so that they may be able to do business successfully in competition with them." H.R. Rep. No. 24, 67th Cong., 1st Sess. 1-3 (1921).

[7] "It is objected in some quarters that this repeals the Sherman Act as to farmers. That is not true anymore than it is true that a combination of two or three corporations violated the Act. Such combinations may or may not monopolize or restrain trade." 61st Cong. Rec. 1033 (1921).

ly broadening the labor exemption (Clayton Act, § 20, 29 U.S.C. § 52; Norris-La Guardia Act § 4. 29 U.S.C. § 104), and extensive affirmative regulation pursuant to a complex regulatory scheme enacted by Congress of the activities of unions, this Court has continued to narrowly construe the scope of the exemption for labor unions from antitrust constraints.

It is noteworthy that this Court has held the antitrust laws are applicable to the anticompetitive activities of labor unions and others when aimed at third parties, despite the fact that the express exemption for labor unions under Sections 6 and 20 of the Clayton Act and the Norris-La Guardia Act (29 U.S.C. § 104) is much broader than the implied exemption contained in the Capper-Volstead Act for agricultural cooperatives. This Court has also held the labor exemption much narrower than the holdings in this case for agricultural cooperatives, despite the fact that labor unions are affirmatively regulated under the Wagner Act (29 U.S.C. §§ 151 et seq.), the Taft-Hartley Act (29 U.S.C. §§ 141 et seq.), and the Landrum Griffin Act (29 U.S.C. §§ 158 et seq.). The absence of affirmative regulation of agricultural cooperatives or broad additional exempting legislation compels the conclusion that joint action by agricultural cooperatives aimed at excluding competitors is not exempt from the antitrust laws.

In addition to the clear legislative history of Capper-Volstead, and this Court's policy of narrowly construing implied exemptions to the antitrust laws, this Court has narrowly construed the exemption in cases involving both Section 1 and Section 2 of the Sherman Act for cooperatives. In *United States* v. *Borden Company*, 308 U.S. 188 (1939) this Court rejected the lower court's view that the Capper-Volstead Act modified the Sherman Act for dairy cooperatives by holding that the Capper-Volstead Act "does not authorize any combination or conspiracy with other persons in restraint of trade these producers may see fit to devise." 308 U.S. at 204-05. In *Maryland and Virginia*, *supra*, the Court held a milk cooperative's conduct in acquiring a competitor to be monopolization under Section 2 of the Sherman Act, stating: "The [Capper-

Volstead] Act does not suggest a Congressional desire to vest cooperatives with the unrestricted power to restrain trade or to achieve monopoly by preying on independent producers, processors or dealers intent on carrying on their own businesses in their own legitimate way." 362 U.S. at 467; see also *National Broiler Marketing Association* v. *United States*, 436 U.S. 816 (1978).

The language of the Capper-Volstead Act, permitting cooperatives and their members to have "marketing agencies in common" and to make "the necessary contracts and agreements to effect such purposes," has never been definitely examined by this Court. Several lower courts, including the District Court in this case (512 F. Supp. at 630), have read this language as wholly exempting from Sections 1 and 2 of the Sherman Act all contracts and conspiracies between independent cooperatives and independent affiliations of geographically and legally separate cooperatives. *Treasure Valley Potato Bargaining Ass'n* v. *Ore-Ida Foods, Inc.*, 497 F.2d 203 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974); *Fairdale Farms* v. *Yankee Milk, Inc.*, 635 F.2d 1037, (2nd Cir. 1980); 715 F.2d 30 (2nd Cir. 1983), *cert. denied*. ___ U.S. ___ (No. 83-749, 1984). These courts have read the statute as granting total Section 1 and Section 2 immunity for inter-cooperative conduct despite the absence of any supporting express language in the statute and clearly contrary rulings by this Court. Such a result greatly expands the scope of the exemption and leaves all who must deal with these entities totally defenseless in the face of their anticompetitive and exclusionary practices.

Amicus believes that the language of the Capper-Volstead Act and the prohibitions of the antitrust laws can more sensibly be reconciled without wholly emasculating antitrust policy, unduly expanding the scope of the exemption, and generating the confusion which these lower court opinions have spawned. When compared with the much broader exemption for the extensively and affirmatively regulated activity of labor unions, it is clear that the lower court opinions in this case have created a dangerous anomaly in the law for powerful regional

cooperatives. Such a result is wholly incompatible with the express language of the Capper-Volstead Act, the Congressional purpose in adopting it, express policies of this Court in construing implied exemptions to the antitrust laws and this Court's prior decisions interpreting it.

II.

STANDARDS UNDER THE SHERMAN ACT.

It is clear from legislative intent and judicial precedent that the cooperatives are to enjoy no greater freedom under the antitrust laws than business corporations. It follows that the antitrust standards applied to the marketplace functions and conduct of Capper-Volstead cooperatives should be no different as well.

To give effect to the Congressional purpose of permitting "marketing agencies in common," it is not necessary to broaden the language of the Act to permit contracts between independent cooperatives with the purpose or effect of unreasonably restraining or monopolizing competition with third parties. In conformity with the general policy that implied exemptions be read narrowly and only to the extent necessary to effectuate the purposes of the exempting statute, *United States* v. *Borden Co.*, *supra*, the exemption for joint action should be read to permit a common marketing agency and only those contracts "necessary" to establish the agency. Contracts between cooperatives going beyond this limited exemption and injuring third parties by virtue of their anticompetitive purpose or effect should be either *per se* illegal or subject to the rule of reason that they are valid only to the extent "necessary" to establishing the joint marketing agency. *Maryland and Virginia*, *supra*; see generally, Flynn, *Rethinking Sherman Act Section One Analysis: Three Proposals for Reducing the Chaos*, 49 *Antitrust L.J.* 1593, 1608-19 (1980).

In the only case reaching this Court where the conduct of a cooperative was found exempt under Section 6 of the Clayton

Act and the Capper-Volstead Act, *Sunkist Growers, Inc.* v. *Winkler & Smith Products Co.*, 370 U.S. 19, *reh. denied*, 370 U.S. 965 (1962), this Court reversed a ruling that a parent cooperative and its two wholly owned subsidiary cooperatives could be found separate persons for purposes of Sections 1 and 2 of the Sherman Act. This Court held that the parties charged with conspiring in restraint of trade were "in practical effect and in contemplation of the statutes one 'organization' or association even though they have formally organized themselves into three separate entities." 370 U.S. at 29.

Unlike *Sunkist Growers*, the joint action complained of in this case is not conduct involving parent/subsidiary cooperatives having an identity of membership. The joint action in the instant case is the product of contracts and conspiracies between wholly independent cooperatives without identical membership or officers and operating in different sections of the country. Consequently, the case is distinguishable from *Sunkist Growers*, and is a case where the normal rules of antitrust conspiracy doctrine should apply. See Warbek & Brill, *Cooperatives Vis-a-Vis Corporations: Size, Antitrust and Immunity*, 33 *So. Dak. L. Rev.* 561, 578-79 (1978).

Thus, by recognizing the narrow scope of the Capper-Volstead exemption, the Circuit Court should have required the District Court to apply traditional Section 1 legal tests to defendant's combinations and conspiracies to determine their evidentiary weight for Section 2 consideration. Plaintiff's allegations and proof established illegal contracts and conspiracies with the purpose and effect of: (1) fixing prices—per se illegal under *United States* v. *Socony Vacuum Oil Co.*, 310 U.S. 150 (1940); (2) allocating customers—per se illegal under *United States* v. *Topco Associates, Inc.*, 495 U.S. 596 (1972); (3) engaging in a group boycott—per se illegal under *Fashion Originators Guild of America* v. *F.T.C.*, 312 U.S. 457 (1941); and (4) coercively imposed exclusive dealing arrangements—illegal under the standards of *Standard Oil Co.* v. *United States*, 337 U.S. 293 (1949); *Atlantic Richfield Refining Co.* v. *F.T.C.*, 381 U.S. 357 (1965); *F.T.C.* v. *Texaco, Inc.*, 393 U.S.

223 (1968). Each violation had an injurious effect on plaintiff and caused it measurable damage. When such actions are viewed as Section 1 violations, they not only undermine the District Court's independent analysis, but also give to defendant's joint agreements and conduct greater evidentiary weight under Section 2 than if viewed as immune and therefore justifiable business conduct.

The Circuit Court did not expressly review, and let stand, the erroneous finding of the District Court that intercooperative agreements were immune under the Capper-Volstead Act and not subject to Sherman Act Section 1 scrutiny, but implicitly did so by ignoring these violations in its analysis of plaintiff's Section 2 claims.

The District Court, as part of its analysis of the scope of the Capper-Volstead exemption, adopted a heavy standard of proof for antitrust plaintiffs, one found nowhere else in Section 2 Sherman Act jurisprudence. The District Court held that cooperative activities were exempt from antitrust subject only to the caveat that they must be "confined to farmers and their organizations and not include 'outsiders' and must not include 'predatory' activities." 512 F. Supp. at 630-31. Furthermore, the District Court expressly rejected this Court's general rule for evaluating monopolistic conduct in *Grinnell*, *supra*, holding that: "*Grinnell* does not apply to monopoly power that results from such acts as the formation, growth and combination of agricultural cooperatives, but applies only to the acquisition of such power by other, predatory means." 512 F. Supp. at 631. The Circuit Court in its *per curiam* opinion affirmed the District Court's finding that "defendant had 'no conscious intent to stifle competition.' " (715 F.2d at 521), and further held that the District Court used the word "predatory" in "its broadest sense." 715 F.2d at 521. The *per curiam* opinion concluded therefore, that the District Court's test was not incompatible with this Court's monopolization precedent or with the opinion of *United States* v. *Dairymen, Inc.*, *supra*, a case involving the same facts and defendant, and an opinion rejecting the higher and undefined burden of proving

"predatory" conduct. The Eleventh Circuit opinion clearly misreads the District Court opinion, because the trial court expressly applied a higher and different standard for Section 2 cases requiring proof that conduct be "predatory" rather than "exclusionary" or competition-stifling.

Furthermore, this Court required in *Continental Ore* v. *Union Carbide*, 370 U.S. 690 (1962) that the defendant's conduct must be evaluated by reference to the "whole picture," and that "the plaintiff should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clear after scrutinizing of each." 370 U.S. at 698-99. The "predatory" test results in general disregard of the cumulative effect of evidence otherwise relevant but not individually pernicious.

The adoption of this "predatory" test by some courts has created a rift with the Circuits which have followed the traditional methods of scrutinizing conduct under the antitrust laws required by this Court. The Sixth, Eighth and Ninth Circuits have squarely rejected the "predatory" test, and the Second and Eleventh Circuits have required or affirmed it.

The contrary holding by the Sixth Circuit in *United States* v. *Dairymen, Inc., supra*, shows clearly how unusual and troublesome this rift is in the Circuits. Two Circuits (Sixth and Eleventh) reviewed the same facts and same conduct of the same defendant under the same law and came to two different decisions.

In *Alexander* v. *National Farmers Organization*, 687 F.2d 1173 (8th Cir. 1982), the Eighth Circuit, quoting the Sixth Circuit in *United States* v. *Dairymen, Inc.*, stated:

> That Court squarely rejected the argument that Section 2 prohibits co-ops only from engaging in narrowly defined "predatory practices." We agree. 687 F.2d at 1183.

In *Pacific Coast Agricultural Export Association* v. *Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976), the Ninth Circuit Court held that where the jury found specific intent and monopoly power, there was

no need to find that defendants engaged in "predatory" conduct as well.

The District Court relied upon *Fairdale Farms* v. *Yankee Milk, Inc., supra.*, for its definition of "predatory." The *Fairdale* court held that "*Grinnell* does not apply to monopoly power that results from such acts as the formation, growth and combination of agricultural cooperatives, but applies only to the acquisition of such power by other predatory means." 635 F.2d at 1045.

The Eleventh Circuit's opinion in this case and the Second Circuit's opinion in *Fairdale* are not only in conflict with the Sixth Circuit's opinion in *United States* v. *Dairymen, Inc., supra*, and this Court's standard in *Grinnell*, and every other Section 2 precedent of this Court, but is also in conflict with the antitrust standards this Court has consistently applied in the limited number of cases involving agricultural cooperatives claiming immunity under Section 6 of the Clayton Act and the Capper-Volstead Act. See *United States* v. *Borden Co., supra; Maryland and Virginia Milk, supra.* The Eleventh and Second Circuit opinions seek to read into the Court's clear holding in *Maryland and Virginia* an undefined pernicious element to the standard of plaintiff's proof, while the Sixth, Eighth and Ninth Circuits have correctly construed that opinion as requiring the standard announced in *Grinnell.*

This Court concluded in *Maryland and Virginia*, that the immunity extends only to independent farmers forming a cooperative and that the immunity does not "include a privilege to combine with competitors so as to use a monopoly position as a level further to suppress competition by and among independent producers and processors" (362 U.S. at 472), nor "leave cooperatives free to engage in practices against other persons in order to monopolize trade or restrain and suppress competition with the cooperatives" (362 U.S. at 467). This plainly means that traditional Sherman Act standards under Section 2 are fully applicable to the activities of cooperatives, and for that matter, under Section 1 as well.

The predatory standard is simply an unsupported reach by the agricultural cooperatives to legalize their conduct to willfully acquire and maintain monopoly power against some of the very farmers which Capper-Volstead was enacted to protect. From the standpoint of the fair and efficient administration of the law, it is also the use of an undefined and ambiguous concept—one certain to produce differing legal results for the same conduct as in the unusual case here of two Circuits reaching contrary results on the same facts, conduct, law and defendant.

In light of conflicts among the Circuits and the unrestrained accumulation of power by the cooperatives, this Court should clarify that its decision in *Maryland and Virginia* did not announce a "predatory" standard. The holding in that case was not based on strictly predatory acts. Rather, it requires courts to impose the traditional *Grinnell* test, and this Court should stem the rising tide of lower courts holding to the contrary.

III.

HARMFUL EFFECTS OF THE RIFT IN CIRCUITS.

The Petition is replete with descriptions of the extensive artificial restraints on current dairy markets. Cooperatives currently supply about seventy-five percent (75%) of raw milk processed. For this Court to allow the lower courts to broaden the scope of the Capper-Volstead exemption is to further increase their control and diminishes competition in the industry.

This unwarranted protection afforded cooperatives accelerates and deepens the current rift in Circuits over the standards applicable and the correct method of reasoning required in such cases. It is unlikely that the Circuit and District Courts can or will bring conformity to these decisions by themselves. The Federal Marketing Order areas, the pooling arrangements of the cooperatives and the relevant geographic areas established by the courts all cross and re-cross Circuit and District Courts' jurisdictional lines. By squarely rejecting fel-

low court decisions, the courts force processors and cooperatives to pursue two different courses of conduct in the same marketing areas and engage in forum shopping.

The rift in Circuits harms the administration of the Capper-Volstead exemption, antitrust laws, markets and cooperatives. It harms administration of the exemption by expanding it beyond Congress' intention. It confuses the antitrust laws by undermining this Court's policy of narrowly construing such implied exemptions. It harms the dairy markets by further concentration of market power into the multi-billion dollar cooperatives, removing them from remaining competitive market disciplines of supply and demand further contributing to the imbalance in our dairy surpluses. The resulting disorder in the markets, including unrestrained use of premium price enhancements, over and above Federal order prices, harms not only Kinnett, but all independent non-cooperative enterprises dealing in dairy products, and the consumer. The requirement by the cooperatives that independent processors sign committed supply agreements directly injures independent, non-member farmers, by leaving them with no market for their product. This unusual rift in Circuits also confuses administration of the cooperatives, by sending them conflicting signals, and encouraging exclusionary behavior in search of the outer limits of a vague, uncertain standard.

CONCLUSION

This Court is respectfully requested to grant the Petition to settle the question of the scope of the Capper-Volstead immunity, to settle differences among the Circuits in interpreting the exemption, to define the scope of legitimate inter-cooperative joint activity, to bring order to administration of antitrust laws in the exemption, to protect the independent proprietary dairy processors and producers from anti-competitive effects of aggressive agricultural cooperatives, and to give clear, meaningful guidance to cooperatives regarding permissible conduct, thus restoring competitive order to milk marketing. The need for a clear articulation of the scope of the Capper-

Volstead exemption is in the national interest, and *Amicus* respectfully requests this Court to grant the Petition.

Respectfully submitted,

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